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ABSTRACT

In an examination of the dynamics that mold a bill and keep it before the attention of the national legislature, this paper traces the behind-the-scenes history of the Family and Medical Leave Act (FMLA), H.R. 925, from its origin as a benefit solely for pregnant women workers to its current status as a broad remedy for the stresses of modern family life. In the space of only 4 years, the parental leave issue has captured serious public attention, building momentum to keep it squarely before the nation's policymakers. How has this happened? Why has a bill drafted by a half-dozen Washington feminists become the central item on the agendas of more than 70 organizations representing millions of Americans nationwide? This paper looks at these questions and ultimately credits: (1) changes in the roles of women and in the characteristics of U.S. families; and (2) legislators' willingness to acknowledge the current realities of American family life. Concluding remarks assert that there are powerful arguments for the federal response embodied in the FMLA, particularly in its establishment of a minimum labor standard. The guarantee of job reinstatement, at the minimum, represents a floor beneath which benefits should not fall. It is the most basic of workplace entitlements and deserves to be a nationwide standard for all employers. (RH)

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# Concept & Compromise

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# Concept & Compromise

## The Evolution of Family Leave Legislation in the U.S. Congress

by

Anne L. Radigan

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# Introduction

The U.S. Congress may act this year on the Family and Medical Leave Act (H.R. 925). If this legislation becomes law, thousands of American employers, including the federal government, would be required to provide job-protected, although unpaid, leaves of absence to employees who need time off to care for their new-born, newly adopted, or seriously ill children, for seriously ill elderly parents, or for their own serious medical conditions. H.R. 925 would also require these employers to continue the leave-taking employees' medical insurance coverage.

This paper examines the history of this legislation, from its origin as a benefit solely for pregnant women workers to its current status as a broad remedy for the stresses of modern family life.

In the space of only four years, the parental leave issue has captured serious public attention, building momentum to keep it squarely before the nation's policymakers. How has this happened? Why has a bill drafted by a half-dozen Washington feminists become the central item on the agendas of more than 70 organizations representing millions of Americans nationwide? This paper looks at these questions and ultimately credits the changes in the roles of women and in the characteristics of U.S. families, and legislators' willingness to acknowledge the realities of American family life today.

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## Craft, Coalition, and Compromise

There are certain intangible factors that have been purposefully nurtured to promote the Family and Medical Leave Act. To begin with, should H.R. 925 be enacted, it will owe a great deal of its success to the new prominence of family issues on the agendas of policymakers across the political spectrum. Family issues have always been hot property for political candidates, but perhaps never more so than in this election year. In the past decade or so, especially, conservatives set the terms of the "family-policy" debate, defining family concerns as school prayer, opposition to abortion, and the preservation of "traditional values." Now liberals have seized the family theme, citing day care, access to health insurance, and parental leave as key items on the family agenda. All the presidential candidates have addressed family issues. "The family," whatever its political meaning, seems to evoke a responsive chord throughout the electorate.

The popularity of issues defined as family issues inspired feminist organizations to recast many of their own agenda items in the broader family context. Parental leave is probably the premier feminist concern packaged as a family issue, and so far the tactic appears effective with legislators. H.R. 925 has twice cleared four subcommittees and two full committees in the House of Representatives, while a companion mea-

sure in the Senate has generated serious interest in field hearings across the country.

The key to parental leave's remarkable progress in a few short years is not, however, simply the bill's appeal to working parents with young children. While such families are the central beneficiaries of H.R. 925, a number of other constituencies stand to benefit as well. In truth, the Family and Medical Leave Act would serve the interests not only of working mothers, but of the handicapped and the elderly. The diverse appeal of the legislation elicits support from a broad range of organizations and individuals, from the National Organization for Women to the United Mine Workers and the U.S. Catholic Conference.

Labor union support of the parental leave bill is widespread, for H.R. 925 breaks new ground in labor law, providing a minimum leave standard that supporters say is gravely needed. Women are increasing their number and proportion in the workforce and organized labor has responded by promoting initiatives that help employees balance the demands of family and work.

Still, its packaging, broad supporting coalition, and responsive labor policy are not entirely responsible for the progress of the Family and Medical Leave Act. Most, if not all, bills are scaled back to enhance their chances of winning the support of a majority of lawmakers, and the family leave measure before the House of Representatives is the product of extensive compromise. H.R. 925 is an instructive example of Congress's preference for a cautious approach to change. The provisions of the original parental leave proposal were considerably more sweeping than those of the version awaiting House action. The original bill, discussed in detail below, would have covered all employers except those with fewer than five employees and thus would have guaranteed leaves of absence for most American workers. In its present form, however, H.R. 925 would cover fewer than half of all workers when it is fully phased in to apply to employers with 35 or more employees. The number of weeks of leave required to be offered have also been reduced. Nevertheless, proponents of the bill point out, the underlying principle of minimum job protection remains unaltered, providing a foundation of security for families that can be built upon in the future.

## The Family and Medical Leave Act (H.R. 925)

The contours of the bill that awaits action by the full House of Representatives as of June 1988 are as follows:

- It applies to all employers with 50 or more employees for the first three years after it is enacted; thereafter, it will apply to all employers with 35 or more workers.
- It entitles eligible employees—defined as those who have at least one year on the job and work at least 20 hours a week—to up to 10 weeks of family leave over a two-year period in order to care for a new-born, newly adopted, or seriously ill child, or seriously ill parent.
- It allows eligible employees to take up to 15 weeks of leave for the care and treatment of their own serious health problems, as certified by a physician.
- It permits employers to deny leave to high-salary workers—defined as those whose salaries place them in the top ten percent of the employer's salaried workers—if these employees' absence would cause "grievous" economic hardship to the employer's enterprise.
- It does not require that employers pay leave-taking employees during their absences, but it does require employers to guarantee the employees' jobs and to continue their health insurance coverage (if the employer provides that benefit to employees) during the leave period.

The Family and Medical Leave Act is modest by the standards of parental leave policies in many countries, especially those that require that leave-taking employees be paid, but it represents a major step in family and labor policy in the United States. H.R. 925's broad coalition may applaud

the step, but many businesses are fiercely opposed to it. Rather than viewing the bill as providing a reasonable and necessary minimum labor standard, the U.S. Chamber of Commerce, in particular, sees it as an unwarranted government-mandated benefit that threatens the freedom and competitive edge of the American marketplace. The position of the Chamber appears to be quite firm: federal authority to determine employee benefits, in principle and in practice, is wholly unacceptable. Leave policies must, says the Chamber, be left to individual employers, many of whom are already establishing such programs in order to retain their skilled workforce.

Therefore, members of Congress, who are under intense lobbying by both sides on the issue, face an either/or proposition. Further compromise on H.R. 925 may be impossible. A principle is at stake, both for the Chamber of Commerce, which rejects federally mandated benefits, and for the measure's supporters, who have pared the bill's provisions to the bone. Legislators must decide whether they are for or against the Family and Medical Leave Act as it now stands.

It is instructive to look back at how this situation developed. What follows is a behind-the-scenes history of the Family and Medical Leave Act.

# A Bill Is Conceived

## A California Statute in Question

The issue of a national parental leave policy in the United States first arose in the 1920s, when the International Labor Organization (ILO) met and recommended that member nations enact maternity leave laws. The current leave policies of most European countries took root from the ILO conference, but it was not until 1978 that American policymakers began to come to terms with the issue of pregnancy and the workplace. Before that time, women workers who became pregnant were frequently fired or reassigned to less visible—and less remunerative—jobs. If afforded a leave of absence, new mothers ready to return to the workplace might discover that their jobs were no longer available. Fringe benefits, such as insurance coverage, provided to other workers on leave with temporary disabilities were not routinely provided to pregnant employees who took leave. Congress corrected this injustice by enacting the Pregnancy Discrimination Act (PDA) of 1978.

The PDA is an amendment to Title VII of the Civil Rights Act of 1964, which outlaws employment discrimination on the basis of race, color, religion, national origin, or sex. As amended by the PDA, Title VII stipulates that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability to work."

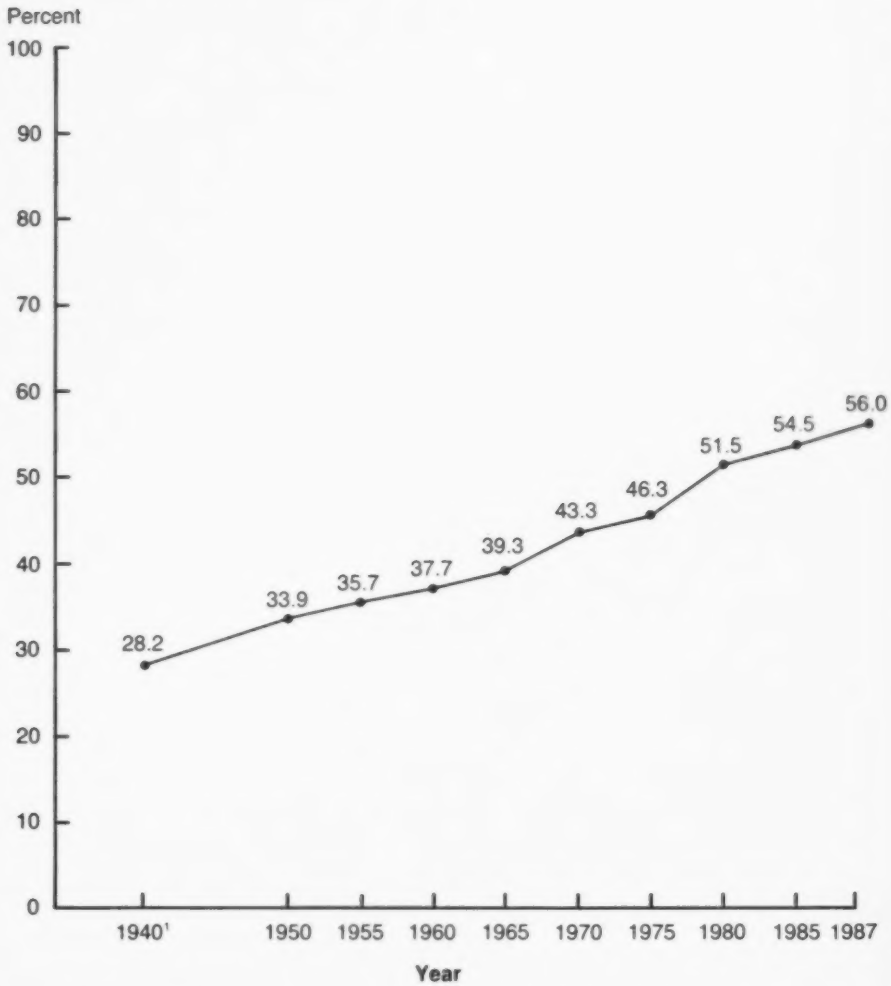
This anti-discrimination remedy was a major victory for working women. Yet it applies only to employers who offer fringe benefits to disabled workers, and only if the employer has 15 or more employees. Thus, women employed by businesses that do not offer fringe benefits to disabled workers are not entitled to leave and reemployment rights under the PDA. Moreover, about 22 percent of the nongovernment workforce is employed by businesses with fewer than 15 workers (Bureau of National Affairs, 1987: 42). In other words, an absolute right for pregnant women to take maternity leave was not encompassed by that legislation.

Even if the federal government made no pronouncement in this area, however, the states were free to act and several did. In 1978, as the PDA was enacted, the California assembly passed an amendment to the state's Fair Employment and Housing Act adding to the state's existing disability program a provision that entitled women workers in the state to an unpaid, four-month pregnancy disability leave with job reinstatement. Unchanged were the existing provisions with respect to other temporarily disabled employees, for whom the statute provided wage replacement but no job guarantees and no minimum leave-lengths.

The statute was challenged by California Federal Savings and Loan (Cal. Fed.) after the bank was cited for refusing to reinstate an employee, Lillian Garland, following her state-sanctioned maternity leave. In *California Federal Savings and Loan v. Guerra*, Cal. Fed. argued that the law allowed a special break for pregnant women amounting to discrimination against men. This preferential policy, said the bank, violated the PDA. On February 9, 1984, the U.S. District Court for the Central District of California ruled on the case and agreed with the bank, stating: "California employers who comply with state law are subject to reverse discrimination suits under Title VII [of the Civil Rights Act] by temporarily disabled males who do not receive the same treatment as female employees disabled by pregnancy."

The district court's decision sent shock waves through California's feminist community. An appeal was prepared. At the same time, the U.S. Congressman who had authored the California pregnancy disability statute when he was a member of the California state legislature decided to act on the federal level against the court's ruling. Howard Berman (D-CA) decided to seek a nationwide policy to protect the jobs of working women temporarily disabled by pregnancy and childbirth.

**Figure 1.** Civilian Labor Force Participation Rates for Women Age 16 and Over, Selected Years, 1940-87




[1] Includes women age 14 and over.

Source: Bureau of the Census, 1947, Table 1; Bureau of Labor Statistics, 1985, Table 5; January 1986, Table 39; and January 1988, Table 2.

## The Dual Burden

The need for such protection has been amply demonstrated. More women than ever before are in the paid work force (Figure 1), more than doubling their numbers in a single generation. Career fulfillment is certainly a motivating factor, but the majority of women also work for economic reasons. The two-paycheck family is the norm among married couples.

The number of mothers working outside the home is four times greater than in 1950. Today, 60 percent of women with children between three and five years old are in the labor force. Most dramatic has been the increase in the number of working mothers of young children (Table 1). Increasingly, women are returning to work soon after the birth of a child: almost one-half of all mothers of children under the age of one are working outside the home (U.S. Bureau of the Census, 1986). These women represent the fastest growing segment of the U.S. workforce.

Approximately 75 percent of women in the labor force are in their child-bearing years. For the majority of those who become pregnant, their employer's maternity policies may be an unpleasant surprise. The size of the establishment in which they work is a key factor. Studies done in the late 1970s found that the vast majority of firms with 100 or more employees provided disability leave for pregnant women and guaranteed their jobs upon return (Kamerman et al., 1983). These findings were borne out by a recent study conducted by the National Council of Jewish Women (NCJW) which concluded that "the provision of eight or more weeks of job-protected medical leave for maternity is now the norm in the American workplace" (Bond, 1987: 395). However, according to the NCJW, firms providing paid maternity leave are in the minority: 36 percent of employers with 20 or more employees, and 11 percent of employers with fewer than 20 employees. Somewhat more one-third of the establishments surveyed by the NCJW allowed some job-protected family leave in addition to eight or more weeks of medical maternity leave; four weeks was the amount of family leave most frequently offered. However, only 12 percent of employers with fewer than 20 workers (compared to 71 percent of those

**Table 1.** Labor Force and Employment Experience of Women with Young Children, March 1986 (in percentages)

| Family Type | With Children Under Age 3 | | With Children Under Age 6 | |
|---|---|---|---|---|
| All women with children | | | | |
| Working full-time | 29.7 | 44.8 | 33.3 | 48.4 |
| Working part-time | 15.1 | | 15.1 | |
| Unemployed | 5.9 | | 6.0 | |
| Not in labor force | 49.2 | | 45.6 | |
| Married, husband present | | | | |
| Working full-time | 30.7 | 47.0 | 33.2 | 49.7 |
| Working part-time | 16.3 | | 16.5 | |
| Unemployed | 3.9 | | 4.1 | |
| Not in labor force | 49.1 | | 46.2 | |
| Other ever married[1] | | | | |
| Working full-time | 33.1 | 46.0 | 42.9 | 55.2 |
| Working part-time | 12.9 | | 12.3 | |
| Unemployed | 11.5 | | 9.5 | |
| Not in labor force | 42.6 | | 35.4 | |

[1] Includes widowed, divorced, and married with an absent spouse.

Source: Bureau of Labor Statistics, unpublished data.

with more than 20 workers) set the conditions of leaves by a standard policy. The absence of such standards, according to the NCJW, "introduces uncertainty and places some workers at considerable risk" (Bond, 1987: 394).

The only federal standard with respect to maternity and parental leaves is the Pregnancy Discrimination Act. And, as discussed earlier, this law does not require employers to provide benefits, only to be even-handed about administering those benefits they do provide.

## Special Versus Equal Treatment

The news that a member of the U.S. Congress wanted to correct this situation by implementing the California statute at the national level might have been expected to prompt jubilation. Instead, it received a mixed reaction, of both interest and alarm, from feminist attorneys in the nation's capital.

Why should this news cause alarm? The reason is that many feminists were quietly in partial agreement with the district court's decision in the *Cal. Fed.* case. They viewed the maternity leave statute as a well-meaning but nonetheless "protective" measure at odds with the principle of equal treatment of male and female workers.

Historically, protective labor laws limited the hours and kinds of jobs that women could work in order to ensure healthy childbearing. The results of these protections can still be felt today in employment discrimination, occupational segregation, and the differential between men's and women's wages. Those favoring the equal treatment model believed that any workplace preferences made solely for pregnant women, no matter how noble their intent, would inevitably lead to workplace discrimination against women.

West Coast activists and their allies who supported the California maternity law countered that since women alone bear children they are at an indisputable disadvantage compared to working men and require an edge to help them remain competitive in the workplace. The law's supporters also argued that since women are increasingly indispensable to the workforce, employers whose businesses depend heavily on female productivity are unlikely to discriminate against women employees because of a maternity leave preference.

This was an argument over means, not ends: the common goal was workplace equity. Nevertheless, the issue evoked strong feelings on both sides, and they naturally split over the federal district court's *Cal. Fed.* decision. West Coast feminists were determined to appeal the ruling and win reinstatement of the maternity leave law; at the same time, Rep. Berman began to draft federal legislation that would codify the California measure as a national policy.

Equal treatment proponents welcomed the idea of pushing beyond the confines of the Pregnancy Discrimination Act, but they opposed reintroducing the theme of women as special members of the workforce. Such a move, they feared, would spark a renewal of the debate about "women's place" in society. In the hands of ambivalent legislators, this could be extremely dangerous.

The political climate in Washington in the mid 1980s was decidedly conservative. The Reagan administration's platform of antifederalism and "traditional values" made a strong impression on many policymakers. Women's rights proponents were put on the defensive, finding themselves having once again to justify long-accepted theories of equal rights under the law. A phalanx of legislators remained committed to the feminist agenda, but the general sentiment of Congress was one of cautious moderation: the narrower and more circumscribed the women's issue, the better its chances for consideration.

If a federal bill were introduced along the lines of the California statute—that is, confined to providing special treatment for pregnant workers—how, in the prevailing political atmosphere, could equal treatment proponents ever change the terms of the debate? These activists recognized that the majority in Congress was likely to be indifferent to the subtleties of feminist legal thought. Handed a narrowly drawn proposal on maternity leave, legislators would be apt to close their minds to larger issues. This

was precisely what the Washington-based feminists wished to avoid, for they had identified a means of achieving maternity leave policy within the equal treatment theory.

## Universal Disability Leave and Parental Leave

The way to provide job protection for pregnant women without setting them apart from the rest of the workforce was to extend job protection to all temporarily disabled workers. Women could not then be singled out as requiring special treatment and run the risk of appearing burdensome to employers. To add a contemporary spin to the issue, Washington feminists expanded this concept to another level: both mothers and fathers would be entitled to leaves to care for their newborns—giving time to bond with and nurture their infants. With this provision, the equal treatment model would cross over from the women's agenda to the family agenda.

Feminist lobbyists had been trying, in recent years, to make the case that women's concerns were family concerns. In this wider context, policies to enhance women's economic and societal status would be viewed as enhancing the family unit. "The family" is sacred to policymakers, but the "pro-family" banner had, for some time, been appropriated by the far right. Now, in parental leave, there appeared an issue that, although conceived as a women's rights measure, had a direct family orientation that might attract conservative interest while at the same time drawing the pro-family label back to the political center. Here was an opportunity to weld women's and family concerns into a new concept for Congress.

As the Washington-based feminist lobbyists were developing their concept, interest in doing something about parental leave was rising on Capitol Hill, in particular among a number of other members of the California congressional delegation; they alerted their colleague Rep. Berman to their concern about the *Cal. Fed.* ruling, and their interest in a federal job-protected leave policy. These influential members of the House, all Democrats, included Rep. George Miller, chairman of the Select Committee on Children, Youth and Families, and Rep. Barbara Boxer, an outspoken former San Francisco city commissioner. Rep. Berman's close friend and ally, Rep. Henry Waxman, could also be counted on to play a role in shaping policy. All wished to respond to the judicial invalidation of the California state law while also addressing a broader concern about fathers' roles in nurturing healthy families. They conceived a proposal to provide both parents with job-guaranteed leaves of absence upon the birth or adoption of a child, with an additional provision that the parental leave could begin for women before the baby arrived to cover any disability arising from the pregnancy.

Combining the disability and child care concepts was intended to address both the narrow issue of maternity disability and the larger concern of responsible parenting. The legislators reasoned that by opening the leave-taking entitlement to fathers, the proposal avoided the appearance of a "women's concern" and appealed to a broader constituency.

The news of the California legislators' initiative was greeted with chagrin by the handful of feminist attorneys and organization representatives who had formed themselves into a committee to draft a theoretically sound disability and parental leave bill for Congressional consideration. The core drafting committee included Wendy Williams and Susan Deller Ross of Georgetown University Law School, Donna Lenhoff of the Women's Legal Defense Fund—veterans of the fight for the PDA—and Sherry Cassidy of the Congressional Caucus for Women's Issues. This core group was frequently augmented by such individuals as Sally Orr of the Association of Junior Leagues and Betty Jean Hall of the Coal Employment Project. Helen Blank of the Children's Defense Fund contributed her expertise to the early undertaking, as well.

The drafting committee decided that the parental leave concept could not be stretched to encompass maternity leave (which is es-

sentially a form of disability leave) without running into the special treatment trap, since only women would be able to claim a pregnancy-related medical problem. All the same, the drafting committee members' commitment to the equal treatment approach to policymaking did not dim their appreciation of the sensitive situation that now arose: they would have to alert the parental/maternity leave bill sponsors—influential members of Congress with whom the committee shared respect and admiration—that their proposed legislation was unacceptable, and that the only tolerable initiative was one that distinguished disability leave from parenting leave while ensuring both for everybody.

With many assurances of good will, the drafting committee gingerly conveyed its reservations. The Representatives responded graciously. "Show us something," they said. Little did they know that the current carrying the parental leave proposition was about to shift from Capitol Hill to the outside organizations. The nascent proposal escaped the hands of legislators and was not to return for quite some time.

## An Outline Is Circulated

The leave proposal outlined by the drafting committee for consideration by the members of Congress had a wide reach: no employer exemptions from the proposed policy were envisioned; it was meant to provide for all workers who may experience a disabling medical condition, need time to establish family cohesion with a new baby, or administer to a gravely ill child. The outline did not call on employers to pay wages to workers on leave, but did require pre-existing health insurance benefits to be continued.

The drafting committee members recognized that theirs was a considerably grander idea than the one their congressional allies had in mind. Moreover, it was plain that a half-dozen or so Washington lawyer-lobbyists, no matter their extraordinary commitment and expertise on the PDA, had little weight with which to sway a congressional delegation amply supported in its point of view by the feminists among its own California constituents.

So, even as the drafting committee's outline was being delivered to the California representatives, the committee set out to enlist a wider range of organizational interest in its proposal. Brought in at this stage were traditional women's groups, such as the American Association of University Women; more specialized associations like the Pension Rights Center; and several labor organizations, including the United Auto Workers, the Service Employees International Union, the Communications Workers of America, and the International Ladies' Garment Workers' Union. The drafting committee's strategy was to involve these groups in fleshing out its outline for parental and disability leave, and thereby establish a coalition invested in the proposal. This is an important element in developing real commitment to a measure; while various lobbying groups may unite in support of a particular proposal, their degree of commitment to it—and its priority on their agendas—may vary. The inclusive approach adopted by the drafting committee promised the participating organizations a hand in developing the proposal in return for their commitment to work actively for the bill's advancement.

This initial coalition-building strategy was risky. Hopeless decentralization, loss of control, aimlessness—any of these problems could have beset such an undertaking. The mission of the committee, after all, was to put both a bill and a coalition together in fairly short order. Fortunately, the close personal and professional associations among the organizational representatives, and their common goals, protected against breakdowns. Possibly because at this early point in the history of parental leave legislation, the issue was not generally viewed as one likely to move through Congress in the near (or even distant) future, no competition arose among the various groups for control over the measure. The women who had constituted the core drafting committee continued to oversee all matters, determining agendas, calling the countless meetings, and following up on all issues related to the proposal taking shape.

Not surprisingly, this coalition-building strategy did make decision-making cumbersome. Each detail of the proposal—and there turned out to be scores—was subjected to the democratic process. This approach was laborious and time-consuming (a major frustration to some participants as the proposal developed), but it did allow difficult issues to be aired and debated by the various organizations.

For instance, while there was little dissent on the need to initiate a leave bill that provided for both disability and parental leave but treated them as separate concepts, and very little discord over the amount of leave time that should be made available—six months for disability leave, four months for parental leave—the matter of not requiring paid leaves of absence was a source of serious disagreement. Low-income workers would be very unlikely to exercise a right to take a leave without pay. The core of any social policy regarding leaves for disability or parenting, it was pointed out, must be some wage replacement mechanism, so that persons at every level of the workforce could participate.

Admittedly, the drafting committee had experienced its own deep conflict over this issue, but ultimately concluded that a bill requiring employers to pay their absent workers would be viewed by most legislators as much too extreme. The principle of the matter, the committee made clear, was the entitlement of a basic right to take a leave when special circumstances demanded without losing one's job. If wage replacement had to be forfeited, at least the proposal would apply to all businesses, large and small.

The intensive work of the drafting committee took on a life of its own. It dealt with the broad issues as intently as it explored the intricacies of labor law, federally and privately sponsored employee benefits, collective bargaining agreements, and all other factors relevant to the devising of a first-of-its-kind national short-term disability and parental leave policy. The findings of this exhaustive effort by the committee—all of whose members had other ongoing professional responsibilities—were not necessarily intended for inclusion in the bill, but to ensure that the committee possessed expertise in the subject area.

To the members of Congress who had received the drafting committee's original bill outline, these efforts must have appeared futile. Rep. Berman had already sent his copy of the outline to the House's legislative counsel's office[1] and a bill, integrated with the Congressman's original parental-maternity leave concept, was ready to be dropped in the hopper. Neither Rep. Berman nor any of his colleagues wished to introduce a measure that encompassed universal disability leave. In their view, this was not germane to the matter of childbirth and child care.

The coalition was stunned by the legislators' rejection of its approach. The legislators explained their position: it was not that they rejected the equal treatment theory; it was that the equal treatment theory, in the form of the bill developed by the drafting committee, was much too broad to attract serious attention. Rep. Berman felt certain that Congress might move on a leave bill, but not on the version proposed by the drafting committee.

Representatives of the coalition met several times with the lawmakers to debate this assertion. The members of Congress, reminding the coalition that they'd been around the legislative block before, remained behind their own approach to the leave legislation. Coalition representatives, who attempted to dramatize the breadth of support for their approach by appearing *en masse* at the conference table, were equally steadfast. No doubt the amount of work they had already expended in developing their proposal was a factor, but more important was the principle at stake.

If the groups in the coalition had any leverage, it was the growing excitement over the political phenomenon known as the gender gap. This was 1984, a presidential election year, and the gender gap inspired politicians of every stripe to do something for

[1] Each House of Congress has a separate staff of legislative experts who transform draft proposals into the proper bill form for official introduction.

the nation's female electorate. The perceived clout of the women's organizations certainly had an impact on the discussion of the parental leave proposal. But unconnected, more immediate concerns such as the national elections soon overtook both the coalition and the legislators, and the discussion had to be suspended.

Then it was 1985. Contrary to the predictions of many feminists, the gender gap had not been wide enough to unseat President Reagan. On Capitol Hill, legislators reacted negatively to the failure of the Democratic presidential ticket and its feminist adherents. Where only a few weeks earlier politicians had beaten a path to their doors, now feminist women's groups found themselves and their agenda held at a cool and measured distance. Although the California Democrats remained sympathetic, the coalition was perceived as politically weak when it resumed the quest for a parental/disability leave bill.

## The Original Congressional Sponsors Bow Out

As the 99th Congress began, the California members showed signs of having second thoughts about their earlier rejection of the coalition's all-inclusive leave proposal. However, they were now perplexed by other, more practical concerns that arose from the way Congress operates—in particular, from the demands and constraints of the committee system.

When a bill is introduced in the House of Representatives, it is referred to the committee and subcommittee with jurisdiction over the subject matter of the bill. (Many bills get no further; they languish and die with the end of the Congress.) Action on a bill generally begins with at least one subcommittee hearing convened for the purpose of gathering relevant information and airing the pros and cons. If there is sufficient interest in the bill among the subcommittee members, the panel meets to "mark up," or amend, the bill and then sends it to the full committee, where the foregoing process is typically repeated. The full committee's final acts are to vote on the bill and, if it passes, to furnish a report on its contents and purposes for the rest of the House.

In most cases (the exceptions involve bills considered completely noncontroversial), before a bill can come before the whole House for consideration, it must go to the Rules Committee, whose function is to decide the circumstances under which the measure will be considered by the House—for example, how many hours of debate will be allowed, and whether there will be any restrictions on amendments offered from the floor of the House. Only when the bill has been granted a rule can it be brought before the full House for debate and a vote by all the members. Should the bill then win a majority of votes cast in the House, it is referred to the Senate, where a substantially similar process begins all over again.

Members of the House of Representatives typically sit on at least two full committees and several subcommittees of each. They spend a great part of their working hours mastering the intricacies of the topics and issues handled by their committees and subcommittees. House members normally appoint one or two of their own staff persons to assist them in this chore, and they also rely on committee and subcommittee staffers. All other subject matters—that is, those outside the members' committee jurisdiction—are dealt with by members on a catch-as-catch-can basis. Legislative aides handling noncommittee issues for members generally are responsible for a staggeringly diverse (and oft-times inconsequential) pile of subjects.

The length of the process and the committee responsibilities of members of Congress mean this: members tend to resist assuming principal authority for issues outside their committees' purview.

The parental/disability leave proposal developed by the coalition of women's groups—a measure now tentatively entitled the Family Economic Security Act—was more than just a theoretical problem for the interested members of the California congressional delegation. Not one of these members sat on the panels (the Education and Labor Committee and the Post Office and Civil Service Committee) to which such

a proposal would be referred. The draft bill urged by the coalition was obviously wide in its reach; to advance it would require both substantial personal and staff resources and time, commodities hardly infinite to legislators.

Rep. Berman remained deeply concerned about resolving the California dilemma left by the court's decision in the *Cal. Fed.* case—an appeals court ruling on the case was expected at any minute—and it must have been deeply disappointing to him that his initiative in this regard was not wholly embraced by the coalition. Nevertheless, he informed the coalition members that he would not act against their interests. He gladly promised to cosponsor their proposal and to work for its approval, but he could not act as its chief sponsor. Rep. Berman has been true to his word, remaining actively behind leave legislation. While other legislators went on to earn considerable attention for their key sponsorship of the Family and Medical Leave Act, it should not be forgotten that the legislation owes its conception to Rep. Howard Berman of California.

## The Dean of Congresswomen Steps In

The coalition had demonstrated its dominance over the direction of parental leave. Yet now there was no congressional sponsor for the coalition's proposal. This situation prevailed for perhaps an hour after Rep. Berman announced that he could not sponsor the bill. It took about that long for Congresswoman Patricia Schroeder to offer her leadership for the coalition's proposal.

Rep. Schroeder, the senior woman in the House, is generally regarded as the foremost women's rights activist in Congress. A Harvard-educated lawyer, she is very smart, a quick study, and an indefatigable legislator. Furthermore, Rep. Schroeder chairs the Civil Service Subcommittee of the House Post Office and Civil Service Committee—the subcommittee with jurisdiction over legislation to provide parental/disability leave for government employees. Federal workers were included in the coalition's proposal. And, as co-chair of the Congressional Caucus for Women's Issues, a legislative service organization comprising more than 100 House members and a staff that acts as liaison with the women's organizations, Rep. Schroeder had a built-in congressional coalition with which to launch the bill.

As it happened, the Colorado Democrat had been looking for a popular issue to renew the flagging post-election interest in women's rights, and the parental leave idea was a perfect tonic. It crossed over into the "pro-family" domain, which was particularly attractive to Rep. Schroeder because it not only broadened the appeal of a women's initiative but it also stole the thunder of the new right. A savvy politician with a knack for delivering memorable one-liners, Rep. Schroeder was the ideal pitchwoman for the parental/disability leave proposal. All in all, Rep. Schroeder was perfect for the bill and the bill was perfect for her.

So, happily for all involved, the work of the drafting committee was to be rewarded after all. In a final flurry of activity, the coalition completed its magnum opus. The proposal delivered to Rep. Schroeder included: four months of unpaid parental leave upon the birth, adoption, or serious illness of a child, with post-leave job reinstatement; six months of unpaid short-term disability leave, with job reinstatement; continuance of pre-existing health insurance and maintenance of all other pre-leave employee benefits, such as seniority and pension accrual; a civil court right of action against employers who deny leave; and establishment of a commission to study and make recommendations within two years of enactment with respect to a nationwide paid parental and disability leave policy. (This provision overcame most of the remaining discord in the coalition over the unpaid nature of the leaves called for by the proposal.) All employers involved in interstate commerce were to be covered, as well as all government entities from the federal level down.

**Key developments in evolution of the Family and Medical Leave Act:**

September 1978: California statute entitling women workers to four-month job-protected pregnancy disability leave signed into law.

October 1978: Congress approves Pregnancy Discrimination Act.

August 1983: *California Federal Savings and Loan v. Guerra* filed, challenging California's pregnancy leave statute.

February 1984: U.S. District Court for Central District of California rules in *Cal. Fed.* case, finds California pregnancy leave statute violates Title VII.

March 1984: Informal committee to draft disability and parental leave legislation has first meeting in Washington, D.C.

April 1985: Rep. Schroeder introduces H.R. 2020, Parental and Disability Leave Act, in House of Representatives.

April 1985: U.S. Court of Appeals for Ninth Circuit reverses district court's decision in *Cal. Fed.* case.

October 1985: First congressional oversight hearing on H.R. 2020.

March 1986: Parental and Medical Leave Act, revised version of H.R. 2020, introduced in House of Representatives as H.R. 4300.

April 1986: Parental and Medical Leave Act introduced in Senate as S. 2278.

June 1986: House Post Office and Civil Service Committee passes H.R. 4300.

June 1986: House Education and Labor Committee amends and passes H.R. 4300; now called Family and Medical Leave Act, bill includes leave for care of seriously ill elderly parents.

January 1987: S. 249 introduced in Senate. Otherwise identical to H.R. 4300 as amended by House Education and Labor Committee in June 1986, Senate bill has no provision for care of ill parents.

January 1987: U.S. Supreme Court affirms appellate court decision in *Cal. Fed.* case: California pregnancy disability leave statute does not violate Title VII.

February 1987: H.R. 925, identical to H.R. 4300 as amended by House Education and Labor Committee in June 1986, introduced in House.

October 1987: Bipartisan compromise on H.R. 925 announced, includes reduction in leave time and higher small-employer exemption.

November 1987: House Education and Labor Committee passes compromise version of H.R. 925.

February 1988: House Post Office and Civil Service Committee approves, without revision, federal employee section of H.R. 925.

June 1988: H.R. 925 awaits consideration by House of Representatives.

# A Bill Is Introduced

On April 4, 1985, the formally titled Parental and Disability Leave Act[2] (PDLA) was introduced in the House of Representatives. The PDLA drew only 20 original cosponsors, but the list included many prominent and highly respected legislators. A few of them were Republicans—making the bill arguably bipartisan—and, significantly for the effort to enlist support for the bill beyond the feminist constituency—Rep. Christopher Smith (R-NJ), one of the foremost anti-abortion spokesmen in the House, was among them.[3]

The endorsing organizations were the American Association of University Women, the American Civil Liberties Union, the Association of Junior Leagues, the Coal Employment Project, the National Federation of Business and Professional Women's Clubs, the National Organization for Women, the National Women's Political Caucus, the Pension Rights Center, the Women's Equity Action League, and the Women's Legal Defense Fund.

Interestingly, the fact that the Parental and Disability Leave Act covered temporary disabilities of all kinds prompted little remark from observers on or off Capitol Hill. It is likely that the sheer novelty of the proposal distracted attention from its substantial reach. Certainly true is that the measure's proponents dwelt largely on the parental leave component, which was the bill's central and undeniable appeal.

## The Luck of Timing

With a mere 20 cosponsors and a great deal of groundwork still needed to prepare for its advancement, the PDLA might have been expected to languish. However, the legislation seemed to possess a charmed life from the very beginning. An early happy omen was the number it was given—H.R. 2020. An easily remembered bill number can be enormously helpful in gaining attention, and sympathetic members of Congress would later state that the PDLA was as clear-sighted as its number suggested.

Then, less than two weeks after the PDLA was introduced, the U.S. Court of Appeals for the Ninth Circuit handed down its decision in the *Cal. Fed.* case. To the surprise of many observers, the appellate court reversed the lower court's ruling and found the California maternity leave statute compatible with Title VII. The Ninth Circuit held that the federal Pregnancy Discrimination Act was intended to provide "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." Rather than provoking more equal-versus-special treatment acrimony, the finding served to consolidate support for action at the federal level. Now, more than ever, a national leave policy appeared timely.

The backers of H.R. 2020 looked no further for a press strategy. The Ninth Circuit Court's clear ruling, and Cal. Fed.'s immediate appeal to the Supreme Court, made the issue of parental leave eminently newsworthy. Most reporters covering the issue gave the bill a favorable spin.[4] The

[2] The name of the bill was to change once more, but the move away from using "family" in the title of the prototype bill was due to the apprehension of drafters that the measure would be mistaken for the property of the far right.

[3] The anti-abortion connection has been made repeatedly in behalf of parental leave, but it has yet to create a really firm attachment among anti-abortion forces, despite the lobbying effort devoted to parental leave by the U.S. Catholic Conference.

[4] Several reporters who spoke with the author indicated that their personal sympathies were engaged, since many of them had infants themselves and enjoyed but meager benefits from their own

fortunes of the infant legislation soared, as did the prestige of its sponsor and endorsing organizations, who appeared to possess remarkable foresight.

## Back to the Drawing Board

As the Ninth Circuit decision raised the profile of the parental leave issue, two allies of the women's groups took a second and closer look at H.R. 2020 and quietly pronounced it unacceptable. Organized labor identified passages in the bill that were vague enough to imperil the seniority system.[5] At the same time, disability rights activists took issue with the very use of the term disability throughout the bill. They pointed out that H.R. 2020 defined disability as a total inability to perform a job, a notion of disability that the disabled rights advocates had been struggling for years to overcome.

And then, congressional committee experts pointed out that the free-standing bill did not dovetail with existing labor law.

The message was clear: the PDLA clearly appealed to groups beyond the women's organizations, but its shortcomings were too glaring for their unqualified support. As it stood, H.R. 2020 would not do; alienating the labor and disability-rights communities was unthinkable. The drafting committee would have to be reconstituted; a revised bill would have to be introduced.

A new round of seemingly endless meetings began. So many more individuals joined the drafting committee that conference halls had to be booked to accommodate the participants. Notable additions to the committee at this point were the AFL-CIO, the National Education Association, the Coalition of Labor Union Women, the Disability Rights Education and Defense Fund, the National Council of Jewish Women, the League of Women Voters, the American Nurses Association, and the Older Women's League. Also, for the first time, staff experts—notably Ellen Battistelli, Frederick Feinstein, and the late Linda Ittner—from the relevant congressional committees took part.

Remarkably, the inclusive approach used earlier by the drafting committee worked once again. Not only were the bill's problems addressed successfully, but the cooperative effort produced real commitment from a larger and more diverse coalition than before. Any disgruntlement that may have lingered among organizations not included in the development of the prototype bill soon dissolved. It should be noted, however, that participation in the drafting process did not ensure an organization's endorsement of the product, as had occurred earlier. For some groups with many levels of bureaucracy—the AFL-CIO, for example—endorsement of parental leave legislation followed lengthy intraorganizational debate.

The redrafting proceeded smoothly for the most part and largely unbeknownst to the congressional sponsors. Coalition members continued to call for a national parental and disability leave policy but avoided asking legislators specifically to cosponsor the imperfect H.R. 2020.

The congressional experts' concern about the free-standing nature of H.R. 2020 was solved by modeling the revision on the existing Fair Labor Standards Act. Labor's problem with the bill's unintended threat to the seniority system was solved with the addition of a single paragraph making clear that, in the event of a layoff, leave-takers would not be eligible for their jobs ahead of more senior workers.

Resolving the disability-rights community's quarrel with the bill was even easier: the term "medical leave" was substituted

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employers' leave policies. In this connection, an ironic situation arose in the spring of 1986, when the Department of Labor had to cancel a long-planned family policies seminar co-hosted by the private-sector Bureau of National Affairs (BNA). The Newspaper Guild went on strike against BNA and U.S. Labor Secretary William Brock did not want to cross the picket line. Prominent among the reasons for the strike was BNA's refusal to allow the issue of parental leave to be brought to the bargaining table.

[5] This particular problem dwelt in the unintended inference that leave-takers would have an unconditional right to their jobs, superceding the right of more senior nonleave-taking employees, in such cases as widespread layoffs.

for "disability leave" throughout H.R. 2020. Medical leave more precisely defined the matter anyway, since H.R. 2020 construed this type of benefit to cover health conditions ranging from pregnancy-related varicosities to chemotherapy treatments for cancer patients.

Once these problems were disposed of, new issues arose. By mid-1985, the first negative rumblings about H.R. 2020 began to be heard. The bill's coverage of small employers was troublesome to some legislators. This was a thorny issue, putting proponents on the defensive. The "redrafting" committee (hereafter referred to as the coalition) decided to compromise. By establishing their own limits on the bill's coverage, proponents hoped not only to reinforce their control over the terms of the debate but also to signal their responsiveness to concerns about hardships for employers.

The compromise that the coalition could agree on was an exemption for employers with fewer than five workers—the same exemption that pertains to the Fair Labor Standards Act, which established the minimum wage and was used as a model for revising H.R. 2020. (Under Title VII of the Civil Rights Act, of which the Pregnancy Disability Act is a part, the employer exemption is higher—fewer than 15 employees.)

At this point, the coalition felt somewhat magnanimous about compromising at all. After all, there was as yet no organized opposition to H.R. 2020's universal employer coverage. Nevertheless, if it soothed congressional concerns to exempt small employers from coverage, why not? The prospects for the revised legislation could only be strengthened by this modest concession: now the measure could be addressed as a pro-family initiative that also was sensitive to the needs of small businesses.

# The Issue Catches Fire

There were a few observers of the coalition's rewriting marathon who wondered what purpose would be served by a fresh bill if no actual congressional action had occurred suggesting the need for a more substantive initiative. The normal legislative process would call for a thorough airing of the legislation before the markup began, but here was a situation where the markup (albeit unofficial) was already well underway. Congressional staffers feared that the quest to revise was turning into an obsession. It was time to act.

H.R. 2020 had aroused enough public enthusiasm by the fall of 1985 to warrant an oversight hearing on the prevalence of maternity and paternity leaves among American businesses. Since congressional oversight hearings explore issues, rather than specific legislation, such a hearing was a perfect approach to the matter at hand. The revised bill was not yet ready for introduction, but its subject was ready for a national forum. Parental leave had all the ingredients to make a fine oversight hearing: a well-defined problem, real people ready to relate how their lives had been affected by the lack of leave, solid statistics, many stellar spokespersons, and a simple-sounding solution.

Parental leave was sufficiently intriguing that the chairs of all subcommittees[*] to which H.R. 2020 had been referred agreed to a joint oversight hearing. These members of Congress and their panels were: William ("Bill") Clay (D-MO) and Austin Murphy (D-PA), chairs respectively of the Labor-Management Relations Subcommittee and the Labor Standards Subcommittee of the Education and Labor Committee, and Patricia Schroeder and Mary Rose Oakar (D-OH), chairs respectively of the Civil Service Subcommittee and the Compensation and Employee Benefits Subcommittee of the Post Office and Civil Service Committee.

On October 17, 1985, the four panels met to conduct the first congressional probe into leave policies for employees in America. The event was enormously successful. Substantial and eloquent testimony entered the record, making a strong case for a federal response. With all the skillful orchestration behind the scenes, the outcome was hardly surprising.

Ten witnesses, carefully chosen by Hill staffers to express impassioned support for a federal bill from different vantage points, appeared before the joint panels. It was an artful display that included a self-styled "macho man" from the United Mine Workers juxtaposed with a spokeswoman for the Association of Junior Leagues. The homey pediatrician T. Berry Brazelton, who rolled a short film of happy infants bonding with their parents, charmed legislators from both sides of the aisle. The mood was mellow. It is likely that panel members who harbored reservations about a federal response to the leave problem felt that an oversight

[*] The multiple committee and subcommittee referral of H.R. 2020 stemmed from the broad areas of law touched on by the bill. Since it involved workers not only in the private and nonfederal government sectors but also in the federal government, it was referred to two full committees: the Education and Labor Committee, where it was referred to both the Labor Standards Subcommittee (because of its similarity to the Fair Labor Standards Act) and the Labor-Management Subcommittee (because of its impact on employee benefits and labor law); and the Post Office and Civil Service Committee, where it was referred to two of that committee's subcommitteees, (1) Civil Service and (2) Compensation and Employee Benefits. The current version of the bill, H.R. 925, was subject to the same multiple referral.

hearing was a harmless affair and therefore not the place to express hostility. It is also probable that, since little public opposition had surfaced at this time, no members were willing to appear negative. Whatever the reason, a few congressional panelists expressed some careful skepticism but no uncontrovertible opposition. In its first official outing, the issue of parental leave emerged unscathed.

## The Revision Is Introduced, The Opposition Is Organized

The momentum developed by the successful oversight hearing picked up speed over the next few months. The Supreme Court agreed to consider the ultimate fate of the California pregnancy leave statute, setting off a new round of press coverage for the possibility of a nationwide parental leave requirement. Shortly thereafter, the coalition completed its revisions and the four congressional subcommittee chairs agreed not only to be the principal sponsors of the new bill but to get it moving immediately. Most significantly, the proposal found hosts in the Senate: Senators Christopher Dodd (D-CT) and Arlen Specter (R-PA). On March 4, 1986, the new bill, with a new name, the Parental and Medical Leave Act, and a new number (H.R. 4300) was introduced in the House; on April 9, its counterpart, S. 2278, was introduced in the Senate.

All the positive press coverage and good will toward the legislation finally succeeded in arousing the U.S. Chamber of Commerce, which had been following the parental leave issue in relative silence. The Chamber is a long-standing opponent of most federal intervention in the free market. It had, in fact, opposed the PDA when that measure was first introduced. The organization had lately been attempting to hold the line against government-mandated employee benefits, and therefore viewed H.R. 4300 as a dangerous precedent. Consequently, the Chamber's previous reluctance to be seen as the bad guy by attacking parental leave quickly evaporated.

The Chamber hastened to alert its local affiliates around the country that a new mandated-benefits bill was gaining in popularity in Washington. Orchestrated by the Chamber, local mom-and-pop shops began flooding Capitol Hill with their complaints. They argued, first and foremost, that the bill was too costly for employers: holding jobs open while employees were on leave would cause small employers to founder. They argued that the bill was unnecessary because employers were taking steps on their own to provide leaves and job guarantees. They argued that women themselves would be victims of the bill because, as a practical matter, women would be the only employees to demand the proposal's protections, thus making employers reluctant to hire women. They argued that employers would be forced to do away with other popular employee benefits in order to afford to provide the benefits called for by the legislation.

These were damaging assertions and many legislators took notice. H.R. 4300's advocates were vastly outmatched by its opponents in the generation of a grass-roots campaign. Because of the largely negative nature of what Congress was hearing from the local level, critics of the Parental and Medical Leave Act charged that the measure was an "inside-the-Washington-Beltway" phenomenon—an initiative dreamed up by people out of touch with the real needs and concerns of grassroots America. Although the Chamber of Commerce was as busy as (or busier than) the coalition at lobbying members of Congress, the organized opposition to H.R. 4300 had the appearance of a populist crusade.

# The Battle is Joined

By the time the four House subcommittees with jurisdiction took up the legislation, parental leave had become a contentious issue. The Chamber of Commerce was successful in altering the terms of the debate, so that many legislators began to perceive the victims in question as the employers who would be forced by the government to provide leave rather than the employees who currently lacked protections. This shift in sympathies pertained not only to some members of Congress but also to administration officials, who expressed strong opposition to the Parental and Medical Leave Act.

The potential financial impact on small business discomfited even some of H.R. 4300's cosponsors. Large companies might have little problem adapting to the measure; many already offer more generous benefits than those provided by the bill, and a larger workforce more easily enables shifting of employees to take up any slack left by leave-takers. But the Chamber of Commerce claimed that small companies—which in recent years have collectively accounted for the greatest number of new jobs—would pay some $13 billion in employee replacement and administrative expenses were H.R. 4300 to be enacted.

This figure turned out to be a gross overestimate of probable costs.[7] Parental leave backers contended that the financial impact of the legislation would be minimal. For one thing, they argued, employers can redirect the work load or hire temporary workers (many of whom are actually less costly than permanent staff persons) to handle the tasks of absent personnel. And, as a practical matter, since the leave would be unpaid, few employees would be able to afford to take the full amount of leave time provided under H.R. 4300.

All the same, the cost of parental leave became the driving issue. The coalition needed badly to reassert its influence with a message that defused or outshouted the cost argument.

## Compromise and The Family Theme

By late spring of 1986, support for H.R. 4300 was dividing almost squarely on partisan lines. Although several Republican members of Congress played an active role on the measure's behalf, those who sat on the Education and Labor Committee were either resistant or openly hostile to it. Compromise was essential if the bill was to attract general support from GOP regulars and conservative Democrats.

Working with Republican as well as Democratic committee staff, the lead coalition representatives—such as the Women's Legal Defense Fund, the Association of Junior Leagues, the National Council of Jewish Women, and the AFL-CIO—hammered out a painful compromise. Its key elements were raising the cap on the small-employer exemption from five to 15 workers, and capping at 36 weeks the *total* amount of allowable leave time (that is, for family and medical leave combined) an employee could take in a twelve month period. These were concessions to worries about cost. Then, to broaden its pro-family appeal, the measure was ex-

[7] According to the General Accounting Office, "in the estimate prepared by the Chamber of Commerce, the bulk of the cost was the result of assumptions made about the replacement of workers and productivity losses. The Chamber's methodology assumed that 100 percent of workers on leave were replaced, a premium wage was paid (18 percent higher than the worker on leave), and the replacements were somewhat less productive than the worker replaced" (Gainer, 1987: 5).

panded to allow leaves of absence to care for an ill elderly parent as well as a child. This brought the politically powerful American Association of Retired Persons into the coalition and gave the bill a multigenerational "family" character.

The strategy succeeded in winning only three Republicans on the Education and Labor Committee, and their support was grudging at best. Still, two of them were quite influential: Reps. Jim Jeffords (R-VT), ranking minority member of the full committee, and Marge Roukema (R-NJ), ranking minority member of the Labor-Management Relations Subcommittee. It was Rep. Roukema who asked that the bill include elder care. To balance the addition of new beneficiaries, however, Rep. Roukema wanted to cut the weeks of allowable leave-time from 26 to 13 weeks for medical care, and from 18 to 8 for family care. More important, she wanted to limit the legislation's coverage to employers with more than 50 workers—a limit that would leave 44 percent of the American workforce without the bill's protections. This proposal was rejected by the coalition, but Rep. Roukema remained adamant that hers was the only version that could attract a majority in Congress.

The coalition's compromise, now entitled the Family and Medical Leave Act, passed the House Education and Labor Committee[8] on June 24, 1986, but a chaotic atmosphere prevailed in the committee room that day. Republicans critical of the legislation tried to derail the proceedings by parliamentary maneuvers and amendments viewed as dilatory by their Democratic colleagues. Indeed, these amendments were merely delaying tactics; in the course of the time-consuming debate on them, GOP committee members made it clear that—in line with the Chamber of Commerce position—they would not accept *any* version of a federally mandated benefit bill.

Time ran out on the 99th Congress before the pared-back bill could be brought to the House floor. It may have been just as well. The reception accorded the bill by the Education and Labor Committee indicated that the leave issue was not ready for full House debate, and the Senate had taken no action whatsoever on its counterpart bill. The coalition and sponsors set their sights on the new Congress that would convene in 1987, the year marking Congress's bicentennial, and perhaps a year that would usher in a Democratic majority on Capitol Hill.

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[8] The Post Office and Civil Service Committee, in contrast to the Education and Labor Committee, approved H.R. 4300 without dissent. Because the Post Office Committee sees the federal government as a model employer, both Democrats and Republicans on the panel are generally receptive to experimenting with innovations on the federal workforce. For example, that committee has had little trouble passing a bill to require a study of pay equity in the federal workforce, a proposal that has met considerable opposition in the whole House.

# The Drive to the Finish Line

## The Pendulum Swings Back, New Themes Are Voiced

With the advent of the 100th Congress, the Democrats retook control of the Senate and kept control of the House. Proponents of the Family and Medical Leave Act were reinvigorated. When the new Congress opened for business early in 1987, the sponsors of the Family and Medical Leave Act (FMLA), newly introduced as H.R. 925 in the House, and its Senate companion bill, S. 249*, came out of their corners swinging. Other legislative commitments might have kept these members of Congress from giving their all to the FMLA in the past, but the measure was now securely at the top of their agendas. Both congressional legislative schedules and the efforts of the supporting coalition ensured priority for parental leave. All could see that the issue was a durable one; despite the Chamber of Commerce onslaught, the bill was continuing to receive favorable attention from the press and was picking up speed at the local level. A number of state legislatures were acting on similar initiatives, many modeled directly on H.R. 925. Encouraged by the genuine grassroots support for their measure, the FMLA's sponsors decided to launch a full-scale effort to enact the bill.

The first prong of attack was to reassert the reasons for the bill, to restate the popular concerns that necessitated a national leave policy. Members of Congress needed a "hook," a way of expressing themselves so that their listeners got an immediate, favorable, and indelible impression of the issue. Accordingly, the principal sponsors identified positive ways for their cautious colleagues to view a bill widely held at arms length because of its alleged cost.

Rep. Clay took the holistic approach, calling the bill "preventive medicine," because it "went to the heart of what is causing families to struggle." In other words, the Family and Medical Leave Act is good for what ails you. Sen. Dodd unabashedly referred to the bill as "pro-family." These are messages that Rep. Schroeder terms "warm fuzzies" because they give policymakers a nice warm feeling. Warm fuzzies alone, however, can make their sponsors look weak and impractical. H.R. 925 also needed more muscular rhetoric, so supporters emphasized the harder-edged theme of family leave as a minimum labor standard. Anti-abortion legislators supporting the bill even went so far as to call parental leave a "pro-life" measure.

On January 13, 1987, the Supreme Court ruled in the *Cal. Fed.* case and revived parental leave as a women's equity issue. By a six to three margin, the justices upheld the California maternity-leave statute, holding that Title VII does not pre-empt states from providing additional maternity-leave benefits. The California law promotes equal employment opportunity, wrote the court, because it "allows women, as well as men, to have families without losing their jobs."

The high court's decision was a windfall for the supporters of the Family and Medical Leave Act. Occurring as it fortuitously did at the beginning of the new term of Congress, the ruling—and the publicity

* As introduced on February 3, 1987, H.R. 925 was identical to the compromise passed by the Education and Labor Committee the previous June. S. 249, which was introduced on January 6, 1987, differed from H.R. 925 in that it had no provision allowing leave for the care of a seriously ill parent.

arising from it—acted like adrenalin on the bill and its advocates. With its sponsors in a fighting mood and the issue itself apparently once more firmly ensconced on the side of the angels, the FMLA took off.

## Bicameral Action

For the first time, action on a parental leave measure took place in the Senate as well as the House. It is a fact that, even among congressional allies, a shared concern can give way to unbridled and detrimental competition between the two chambers. Wisely, the House and Senate sponsors did not let this happen. They convened hearings almost back-to-back at times, but used the opportunity to build on each other's momentum. By October 1987, the FMLA had been the subject of a dozen committee or subcommittee meetings, including field hearings in Boston, Los Angeles, Chicago, and Atlanta.

However, while the number of House members cosponsoring the bill climbed steadily during these months, several key legislators held back. They were sympathetic to arguments in favor of establishing a national leave policy, but could not endorse the bill before them. It did not, they felt, respond sufficiently to the concerns raised by small businesses. By this time, the principal sponsors had sensibly referred the question of cost to the General Accounting Office (GAO), an independent, nonpartisan government investigative agency, and the GAO's study was underway. But Republicans such as Reps. Olympia Snowe (ME), Nancy Johnson (CT), Claudine Schneider (RI), as well as Jim Jeffords and Marge Roukema—all members to whom moderates of both parties looked for a sense of direction on this issue—wanted substantive proof of the FMLA sponsors' sympathy for the concerns of small employers.

The House Democratic leadership also held back from the FMLA. These members wanted proof, too, but of another kind. They wanted to be certain that the bill would not fail and be an embarrassment to the party. Evidence of its prospects for success would be reflected in the bill's cosponsorship by at least 150 members (some 50 more than H.R. 925 had by mid-1987) and in its supporters' ability to deliver a majority on the House floor.

## Yet Another Compromise

The House Education and Labor Committee can be a fractious panel, given to extreme partisanship on social legislation. A bill that passes the committee along party lines is very likely to fall prey, on the House floor, to the majority which Republicans and conservative Democrats constitute. H.R. 925, despite its momentum and renewed vigor, faced this danger.

By October 1987, the sponsors needed to get the bill through the Education and Labor Committee with some Republican members on board or risk losing the legislation altogether. Reps. Jeffords and Roukema demanded further compromise in exchange for their support, and other members of both parties said they needed some concessions to business concerns before they could support the FMLA. Do *something*, they told the bill's leading sponsors, so that we can say that the bill balances the needs of employers and employees.

The two provisions of H.R. 925 that put some otherwise sympathetic members of Congress off were the length of leave time it allowed (26 weeks for medical care, 18 for family care) and the size of the small-employer exemption (fewer than 15 employees). To these members, the numbers appeared arbitrary and there was no reason not to adjust them to the magic point where they "sounded right." However, the numbers were not in fact arbitrary; they corresponded to leave periods in comparable state programs and small-employer exemptions in comparable federal labor laws. Most important, the numbers determined the proportion of the American workforce that would be covered by the bill and the adequacy of the coverage it afforded. Understandably, further compromise on these central points was a heated issue for the coalition.

Nonetheless, the leading representatives of the coalition once again met with the

House sponsors and Reps. Jeffords and Roukema to hammer out an acceptable revision of the FMLA. Finally agreed upon was a compromise with the following concessions: for the first three years after enactment, the bill would apply to employers with 50 or more employees, and thereafter to those with 35 or more; it would entitle workers to 10 weeks of family leave over a two-year period and 15 weeks of medical leave during a single year; it would not require employers to allow leave to employees with less than a year of service or with less than 20 work-hours per week; and it would allow employers to deny leave to employees earning salaries in the top ten salary percentile of the employer's workforce if the absence of these employees proved a financial hardship on the employer. Unchanged were the other provisions of the bill, e.g., that employers covered by the bill must guarantee leave-taking employees' jobs and continue their health insurance coverage.

The new limits on the legislation met the stipulations of Rep. Roukema and the other moderate House Republicans involved. The endorsement of the compromise by the previously reluctant Republicans was so significant to the primary sponsors that they held a press conference to announce the new bipartisan compromise. At the same time, the sponsors announced the findings of a study by the General Accounting Office showing that the compromise would initially cost employers nationwide about $188 million annually, rising to $212 million once the bill was fully phased in (U.S. General Accounting Office, 1988). These estimates were certainly a great deal less alarming than those of the Chamber of Commerce. H.R. 925 now appeared to represent a balanced policy, one that responded both to the needs of working families and to the legitimate concerns of business, especially small businesses.

With the prominent Republican women of the Congressional Caucus for Women's Issues—Reps. Snowe, Johnson, and Schneider—on board, as well as the key Education and Labor Committee Republicans, Reps. Jeffords and Roukema, the FMLA was now ready for markup. The committee met on November 17, when once again the legislation met with a hostile reception from its Republican critics. To these members, who were true to the unswerving position of the Chamber of Commerce, the concessions meant little. As a matter of principle, they opposed federally mandated employee benefits. The compromise passed the Education and Labor Committee by a vote of 21 to 11; of the GOP members, only Reps. Jeffords and Roukema voted in favor of H.R. 925; of the Democrats, only one—Timothy Penny (MN)—voted against it.

On February 3, 1988, the House Post Office and Civil Service Committee approved the section of H.R. 925 that covers federal employees. Significantly, this committee did not adopt the leave-time reduction embodied in the Education and Labor Committee compromise. Should H.R. 925 as it stands become law, federal civil servants will be entitled to up to 18 weeks of family leave and 26 weeks of medical leave.

# Conclusion

As this is written, the compromise Family and Medical Leave Act awaits consideration by the whole House. As required by the Democratic leadership, the bill has 150 cosponsors. It has the endorsement of more than 70 organizations. If there is one sterling measure of the H.R. 925's appeal to mainstream America, it is that Ann Landers recently recommended it to her millions of readers.

This paper has attempted to describe the dynamics that mold a bill and keep it before the attention of the national legislature. A great deal of hard work by committed people—within and without Congress—is generally involved, although it may appear to the cynical observer that theatrics and manipulation are foremost. Certainly, the art of image-making helps to drive the policymaking process. But neither hard work nor artistry will be effective unless there is a demonstrable need for the legislation.

In the case of the Family and Medical Leave Act, the demographics prove the need. Women with family responsibilities are in the workforce to stay, and their—and their families'—needs are, in many cases, not being met by employers' leave policies. The American economy is increasingly dependent on female labor and families are increasingly dependent on women's earnings. These facts are coming to be accepted by legislators of all political stripes. In the consciousness of policymakers, the 1950s family model is being replaced by today's typical American family—a family with a woman in the workforce.

It is fair to ask whether these demographic changes will not cause employers on their own to establish leave policies, as the Chamber of Commerce contends. Most surveys show that American companies are more likely than they used to be to offer maternity and child care leaves, in response to the number of women in the workforce and the pressure to retain skilled employees. In time, leave policies may, indeed, be more common than they are today, even if the FMLA is not enacted. Nevertheless, there remain powerful arguments for the federal response embodied in the FMLA, in particular its establishment of a *minimum labor standard*. The guarantee of job reinstatement, at the minimum, represents a floor beneath which benefits should not fall. It is the most basic of workplace entitlements and deserves to be a nationwide standard for all employers.

If there is a major weakness in the legislation before the House, it is in the number of employees whom the bill will not help because their employers' establishments are exempt from its requirements. Even the failure of the bill to require paid leaves pales before this shortcoming. However, if the basic guarantees of H.R. 925 become law, legislators are free to revisit the issue and make a more generous statute. In fact, H.R. 925 calls for a panel to investigate and report back to Congress on ways to implement a paid family and medical leave policy. This is the proverbial "camel's nose under the tent" warned against by the Chamber of Commerce, but it is true that, once the principle of the minimum labor standard is established in law, further refinements can be made.

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